Nos. 99-603 and 99-960

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

JUL 19 2000

LEGAL SERVICES CORPORATION,

Petitioner,

—v.—

CARMEN VELAZQUEZ, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

—v.—

CARMEN VELAZQUEZ, *et al.*,

Respondents.

ON WRITS OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE NATIONAL COALITION AGAINST CENSORSHIP, AND THE CENTER FOR CONSTITUTIONAL RIGHTS, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The New York Civil Liberties Union (NYCLU) is one of its statewide affiliates. This case raises the question of the extent to which the government can use its funding power to limit the legal claims that lawyers can make on behalf of their indigent clients. Since its founding in 1920, the ACLU has been deeply involved in the struggle to obtain equal justice for the poor, from *Powell v. Alabama*, 287 U.S. 45 (1932), which established the first right to appointed counsel in criminal cases, to *Legal Aid Society of Hawaii v. Legal Services Corporation* (LSC), 145 F.3d 1017 (9th Cir.), *cert. denied*, 525 U.S. 1015 (1998), which challenged the 1996 congressional restrictions on LSC grantees that are central to this case as well. In addition, the ACLU represented plaintiffs in *Rust v. Sullivan*, 500 U.S. 173 (1991), which petitioners have cited as their principal authority throughout this litigation. The proper resolution of this case is, therefore, a matter of substantial concern to the ACLU and its members.

The National Legal Aid and Defender Association (NLADA), a nonprofit organization incorporated in the District of Columbia, is the largest national association dedicated to ensuring access to justice for the poor in the nation's civil and criminal justice system. NLADA has more

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

than 2000 members, including those legal aid programs funded by LSC. Each year, NLADA's civil program members funded by LSC represent thousands of welfare recipients in court and before agencies in matters directly relating to the administration of the welfare system. NLADA and its civil program members are profoundly troubled by Congress' effort to bar LSC-funded programs from challenging the validity of welfare laws and regulations on constitutional or other grounds. The practical effect of that restriction is to leave the poor served by LSC programs with no legal advocate to raise those claims on their behalf in large parts of the country where non-LSC funded programs do not exist and there are no *pro bono* counsel available who could provide such representation.

The National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of 48 national nonprofit organizations, including religious, educational, professional, artistic, labor and civil rights groups united in the conviction that freedom of thought, inquiry and expression are indispensable to a healthy democracy. NCAC educates the public and policy-makers about threats to free expression and works to create a more hospitable environment for laws, decisions and policies protective of free speech and democratic values. The positions advocated by NCAC in this brief do not necessarily reflect the positions of each of its participating organizations.

The Center for Constitutional Rights is a progressive legal and educational organization that is dedicated to the advancement of the rights guaranteed by the United States Constitution. The Center, which grew out of the Civil Rights Movement in the 1960s, has long been in the forefront of social and economic justice litigation. Three years ago, the Center represented a class of indigent elderly and disabled legal permanent residents in their challenge to the constitutionality of the provisions of the Personal Respon-

sibility and Work Opportunity Reconciliation Act of 1996 that barred eligibility for needs-based public assistance benefits on the basis of alienage. *See Abreu v. Callahan*, 971 F.Supp. 799 (S.D.N.Y. 1997). Last year, the Center served as an *amicus* to this Court in *Saenz v. Roe*, 526 U.S. 489 (1999), and argued that California's imposition of a residency requirement for public assistance recipients was unconstitutional. The Center strongly supports the federal funding of free legal representation for the indigent. But because the availability of public assistance benefits is of such vital importance to the indigent, the Center believes it is crucial that their attorneys have the freedom to challenge the constitutionality of welfare legislation.

STATEMENT OF THE CASE

The Legal Services Corporation was created by Congress in 1974 to "provid[e] financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. §2996b(a). As Congress noted in the original enabling Act, "there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances," 42 U.S.C. §2996(1), and "to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel . . . ." 42 U.S.C. §2996(2). For the past quarter-century, LSC has pursued these goals by providing financial support to legal organizations around the country that represent indigent clients.

Many organizations that receive grants from LSC also receive financial support from other sources, both public and private. LSC, by contrast, receives its funding entirely from Congress as part of the annual appropriations process. In 1996, after a prolonged political battle, Congress substantially reduced the LSC budget while simultaneously imposing a

new set of restrictions on LSC grantees. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L.No. 104-134, 110 Stat 1321. The legislative record leaves little doubt that Congress was motivated more by ideology than by finances or administrative efficiency. For example, Senator Helms complained that Legal Services programs were "push[ing] social policies down the throats of local governments and citizens. 141 Cong.Rec. S8948 (daily ed. June 22, 1995). In a similar vein, Representative McCollum complained that Legal Services programs were undertaking "impact litigation in an attempt to socially engineer changes in our laws and rules." 141 Cong.Rec. E1220 (daily ed. June 9, 1995).

The restrictions adopted by Congress in 1996, and reenacted every year since, reflect a laundry list of disfavored causes, clients, and claims.[2] But, the specific prohibition at issue is unique even in the context of this broadly worded statute. It expressly authorizes the continued representation of individual welfare clients; yet, it expressly deprives those clients of the ability to challenge the constitutionality of existing welfare laws. *See* §504(a)(16).[3] Moreover, this restriction, along with all the others, applies to the use of non-

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[2] The restrictions are set out in §504 of the 1996 budget law, and summarized in the decision below. *See Velazquez v. Legal Services Corp.*, 164 F.3d 757, 760 n.1 (2d Cir. 1999). Among other things, LSC grantees are forbidden from representing prisoners or aliens (with certain minor exceptions), forbidden from participating in litigation involving abortion or reapportionment, and forbidden from filing a class action or seeking attorney's fees.

[3] To put this prohibition in concrete terms, suppose that Congress adopted a law that made it more difficult for single women to obtain welfare benefits than for single men. A women denied benefits under this law could challenge the finding that she was, in fact, a single woman. But she could not challenge the law itself as a form of gender discrimination while represented by an LSC grantee.

LSC funds as well as LSC funds. Even the former, Congress wrote, "may not be expended for any purpose prohibited by this Act." *See* §504(d)(2)(b).

In its initial set of implementing regulations, LSC extended the reach of the 1996 restrictions to so-called "interrelated organizations," which LSC defined by reference to an earlier regulation as any organization subject to the "control" of an LSC grantee. That expansive interpretation was quickly subject to a preliminary injunction in a parallel litigation. *See Legal Aid Society of Hawaii v. Legal Services Corp.*, 961 F.Supp. 1402 (D.Haw. 1997). In response, LSC issued a new set of regulations designed to mirror the separation requirements that this Court had previously upheld for Title X family planning programs in *Rust v. Sullivan*, 500 U.S. 173 (1991). Under these revised regulations, an LSC grantee may establish a relationship with an "affiliate" organization that is not bound by the congressional restrictions so long as the two organizations maintain their "program integrity." The regulations further provide that the indicia of "program integrity" include separate facilities, separate personnel, and separate accounting.[4]

Plaintiffs brought suit challenging many (but not all) of the statutory restrictions and implementing regulations as unconstitutional. Although recognizing that the revised regulations might prove unduly burdensome in practice, and thus subject to an as-applied challenge at some later point, the district court concluded that they were facially valid under *Rust* and, on that basis, denied plaintiffs' motion for a preliminary injunction. *Velazquez v. Legal Services Corp.*, 985 F.Supp. 323 (E.D.N.Y. 1997).

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[4] The evolution of these regulations is more fully described in the Second Circuit's opinion. 164 F.3d at 761-62.

On appeal, the Second Circuit affirmed the district court's holding in all respects, except one. In an opinion written by Judge Leval, the court of appeals ruled that the provision permitting "representation of a client seeking a welfare benefit . . . only if the representation will not involve any challenge to the propriety of any previously existing rule that led to the denial of benefits" is inescapably viewpoint based and, therefore, unconstitutional. 164 F.3d at 769. As the majority explained:

> It accords funding to those who represent clients without making any challenge to existing rules of law, but denies it to those whose representation challenges existing rules. It clearly seeks to discourage challenges to the status quo. The provision thus discriminates on the basis of viewpoint.

Id. at 769-70.

Both sides sought review in this Court. Only the government's petition was granted, however. Accordingly, the sole question now before the Court is the constitutionality of this viewpoint-based restriction on legal advocacy by LSC grantees that applies even to speech that is privately funded.

SUMMARY OF ARGUMENT

The issue in this case is whether Congress may constitutionally override the professional judgment of lawyers employed in LSC-funded programs by prohibiting them from challenging the constitutionality of existing welfare laws, even if the client's best interest would be served by raising the constitutional claim, and even if the lawyer's work on the case is entirely supported by non-LSC funds. The Second Circuit correctly held that this restriction was impermissibly viewpoint based in violation of the First Amendment.

Although the government has broad discretion over how its money is spent, it may not use its funding power to "aim at the suppression of dangerous ideas." *Speiser v. Randall*, 357 U.S. 513, 519 (1958). Thus, this Court has consistently recognized a critical distinction between cases in which the government itself is deemed the speaker and cases in which the government provides a subsidy to enable private speakers to deliver their own messages. In the first instance, the government is not required to be evenhanded and may promote its own policy preferences and viewpoints which is how this Court has characterized *Rust v. Sullivan*, 500 U.S. 173 (1991). In the latter instance, the government may not skew the terms of the debate by favoring some views over others. *See, e.g., Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

A central question in this case, therefore, is whether Legal Services lawyers who are suing the government can plausibly be described as speaking on behalf of the government or whether, like all other lawyers, they are ethically bound to speak on behalf of their clients. The answer to that question is clear. Indeed, Congress thought so as well when it first established LSC and expressly stipulated that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. §2996.

Petitioners do not quarrel with the rule against viewpoint discrimination. Rather, they contend that it is irrelevant for two reasons, neither of which is persuasive. First, petitioners suggest that the requirement of viewpoint neutrality applies only when government funding has been used to create a public forum, which petitioners argue does not exist here. This Court, however, has never treated the neutrality doctrine as limited to "a public forum in the traditional

sense of the term." *Board of Regents of the University of Wisconsin System v. Southworth*, __ U.S. __, 68 U.S.L.W. 4220, 4224 (March 22, 2000). To the contrary, this Court has long stressed the importance of viewpoint neutrality in diverse settings, including a series of academic freedom cases. Citing those cases in *Rust,* this Court emphasized the importance of viewpoint neutrality whenever the government tries to regulate a "traditional sphere of free expression." 500 U.S. at 200. The government's attempt to restrict courtroom advocacy by Legal Services lawyers fits easily within that category.

Second, petitioners try to salvage the challenged restriction by arguing that it is a categorical limitation on the kinds of cases that LSC-funded lawyers can handle rather than a viewpoint-based restriction on the claims that can be advanced. The problem with that argument is that LSC-funded lawyers are not in fact barred from representing welfare clients in litigation, they have simply been told that they may not argue in the course of their representation that existing welfare laws are unconstitutional. There is no doubt that Congress knew how to write a categorical restriction if it had wanted to -- for example, LSC-funded lawyers are prohibited from handling reapportionment cases. But, whatever the validity of such categorical restrictions may be, this restriction is not one.

Petitioners' reliance on *Rust* is therefore misplaced on several grounds. Unlike *Rust,* the government has not defined welfare litigation as somehow outside the scope of an LSC-funded program; it has never identified any discrete message it is seeking to convey through its ban on constitutional challenges; and it is impossible to characterize a lawyer suing the government as a spokesperson for the government's message, even assuming the government had one. Thus, while *amici* believe that *Rust* was wrongly decided, we also believe it is readily distinguishable.

Finally, because this is a different case than *Rust*, the "separation requirements" that LSC adapted from *Rust* violate the unconstitutional conditions doctrine by imposing an unjustified burden on the use of private funds to support constitutionally protected expression. While the government has an undeniable interest in ensuring that its funds are spent for their intended purpose, accounting procedures that have been in place for many years are more than adequate to accomplish that goal. Accordingly, even if the government could permissibly prohibit the use of its own money to challenge existing welfare laws, this restriction goes too far and cannot be sustained.

ARGUMENT

I. THE FIRST AMENDMENT PROHIBITS USING PUBLIC SUBSIDIES TO RESTRICT THE VIEWS EXPRESSED BY PRIVATE SPEAKERS WHO SPEAK ON THEIR OWN BEHALF RATHER THAN ON BEHALF OF THE GOVERNMENT

This case requires the Court once again to address the issue of government funded expression and to decide what, if any, constraints the First Amendment imposes when Congress uses the power of the purse to dictate the views that can be expressed by the recipients of public monies. Controversies involving government funded expression have, in the past, spawned considerable disagreement, both within the Court and among academic commentators. *See, e.g., Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819; *Rust v. Sullivan*, 500 U.S. 173; and *Island Trees Union Free School District v. Pico*, 457 U.S. 853 (1982). *See also* Redish and Kessler, "Government Subsidies and Free Expression," 80 Minn.L.Rev. 543 (1996); Cole, "Beyond Unconstitutional Conditions: Charting

Spheres of Neutrality in Government-Funded Speech," 67 N.Y.U. L.Rev. 675 (1992); Fiss, "State Activism and State Censorship," 100 Yale L.J. 2087 (1991); Shiffrin, "Government Speech," 27 U.C.L.A. L.Rev. 565 (1980).

Nevertheless, there is a fundamental constitutional divide that emerges from this Court's case law. That constitutional fault line turns on the very basic question of who is speaking for whom. On the one hand are those cases in which the government enlists a private speaker to deliver the government's message. This Court has characterized *Rust* as such a case *See Rosenberger*, 515 U.S. at 833. Under these circumstances, the Court has held that the government may insist that the speaker stay "on message."

On the other hand are those cases in which the government has not contracted with a spokesperson but has instead created a program to facilitate the expression of private views, epitomized most recently by the Court's decision in *Rosenberger*. Often, but not always, the cases in this second category have been analyzed in terms of the public forum doctrine. But on other occasions, the Court has talked more generally about institutions and relationships that remain uniquely dedicated to the free and unfettered exchange of ideas, even when they receive government subsidies and support. *E.g.*, *Southworth*, 68 U.S.L.W. at 4224. Public universities serve as the paradigm but not the only example of such institutions and relationships.

The critical feature in all of the cases in this second category is that the speaker is not in fact acting as an agent of the government, and is not perceived as acting as an agent of the government. Consequently, any effort by the government to claim an agency relationship as a means of controlling the viewpoints expressed by the private speaker would violate important constitutional norms, from academic

freedom to the due process and associational safeguards surrounding the attorney-client relationship.

In order to succeed on this appeal, the government and LSC must essentially argue that a Legal Services lawyer representing a client in litigation against the government is more properly characterized as a spokesperson for the government than a spokesperson for the client, merely by virtue of working in an office that is partially supported by government funds. Simply to state the proposition is sufficient to refute it. The Second Circuit was therefore correct in holding that a rule prohibiting Legal Services lawyers from challenging a welfare law on behalf of a welfare client is an unconstitutional form of viewpoint discrimination.

A. Like All Lawyers, Legal Services Lawyers Speak On Behalf Of Their Clients During Litigation; They Do Not Speak On Behalf Of The Government, Especially When Suing The Government, Even If They Are Supported In Part By Government Funds

There are plainly circumstances where the government has a message to convey and where it provides funding to convey that message. In such circumstances, the government may properly be regarded as the "speaker" and, as the speaker, the government is free to express its preferred position without giving equal weight to countervailing views. As this Court pointed out in *Rust*: "When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism or Fascism." 500 U.S. at 194 (citations omitted). The reason that is true is that the government in that circumstance is acting as "speaker." More specifically, Congress is using public monies to convey a discrete message

shaped by the government's own policy preferences. As the *Rosenberger* Court observed: "[G]overnment [is permitted] to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message . . . [for] when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." 515 U.S. at 833.

Conversely, there are other circumstances when the government funds communicative relationships or when it creates or supports institutions devoted to discourse and expression where it is well recognized that those engaged in expression are not conveying the government's message but are, instead, conveying their own views. This Court's opinion in *Rosenberger* supports this distinction. After discussing the proposition that the government as "speaker" must remain free to support its own policy positions, the *Rosenberger* Court was careful to note that "it does not follow . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize the transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Id.* at 834.

The most common situation where the government provides financial support for communication by private speakers occurs when a state or municipality creates or subsidizes a public forum or a limited forum for individual expression. There is a long line of cases holding that in regulating access to a public forum the government cannot engage even in content-discrimination, and that when administering a limited forum government can establish categorical restrictions that define the nature of the forum but cannot engage

in viewpoint discrimination within the categories of appropriate expression.[5]

These principles were emphatically reaffirmed in *Rosenberger*, where this Court cited *Police Department v. Mosley*, 408 U.S. 92, 96 (1972), in support of the proposition that "[i]t is axiomatic that the government may not regulate speech based upon its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 829. In addition, the *Rosenberger* Court highlighted the special First Amendment concerns that arise when the government discriminates against speech based not only on content, but on viewpoint. Citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992), the *Rosenberger* Court emphasized, in strong and unequivocal terms, that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." 515 U.S. at 829. Thus, even in a publicly funded program, like *Rosenberger*, "[t]he government must abstain from regulating speech when the . . . opinion or perspective of the speaker is the rationale for the restriction." *Id.*, citing *Perry Ed. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 46 (1983).

Indeed, the fundamental premise of this Court's public forum cases, at least since *Hague v. CIO*, 307 U.S. 496 (1939), is that while the speakers in a public forum may be using public facilities or public subsidies to communicate their messages, the messages they are communicating are

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[5] Like the Court in *Southworth*, we begin with the public forum cases because they provide "a close analogy" and the "controlling" legal standard, 68 U.S.L.W. at 4224, not because they define the limits of the neutrality doctrine, as petitioners erroneously suggest. *See* Point IB, *supra*.

their own and not the government's. Government efforts to manipulate these private messages therefore violate the First Amendment, whether they are accomplished directly through a scheme of sanctions, or indirectly through the manipulation of public support. In this regard, *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Capital Square Review Bd. v. Pinette*, 515 U.S. 753 (1995), and *Rosenberger* are particularly instructive.

Each of these cases involved the constitutionality of restrictions directed against religious expression. In each of these cases, the government defended its restrictions upon the claim that if the government were to provide financial support for religious expression it would violate the Establishment Clause. And, in each of these cases this Court rejected the government's defense. It did so because the communication that took place within the public forum was reasonably understood as the expression of private individuals or organizations; consequently, the government was not understood to be endorsing the religious expression at issue, even if it created the forum or otherwise provided financial support that allowed the communication to take place. *Lamb's Chapel*, 508 U.S. at 395 ("under the circumstances of the case there would have been no realistic danger that the community would think that the [School] District was endorsing religion or any particular creed . . . ."); *Pinette*, 515 U.S. 760 (["Pinette's] religious display in Capitol Square was private expression"); *Rosenberger*, 515 U.S. at 834-35 ("The distinction between the University's own favored message and the private speech of students is evident in the case before us . . . The University declares that the student groups eligible for . . . support are not the University's agents, are not subject to its control, and are not its responsibility"). As a result, in each of these cases this Court concluded that the government restrictions amounted

to impermissible viewpoint discrimination in violation of the First Amendment.[6]

Only a few weeks ago, in *Santa Fe Independent School Dist. v. Doe*, __ U.S. __, 68 U.S.L.W. 4525 (June 19, 2000), this Court reaffirmed the distinction "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise clauses protect." *Id.* at 4529, citing *Board of Ed. of Westside Community School v. Mergens*, 496 U.S. 226, 250 (1990)(emphasis in original). At issue in *Santa Fe* was a school district's policy of permitting a student, elected by the student body, to conduct a prayer prior to high school football games. This Court concluded that the policy violated the Establishment Clause because the history and context of the school district's policy, coupled with its reliance upon a majority vote of the student body, left the Court "[un]persuaded that the pre-game invocations should be regarded as 'private speech.'" 68 U.S. L.W. at 4529.

If anything, the relevant history is even less ambiguous here, although it points in the opposite direction. The enabling Act that created LSC in 1974 carefully stipulated that "the Legal Service Program must be kept free from the influence of or use by it of political pressure." 42 U.S.C. §2996. That statutory commitment remains in full force today, and compels the conclusion that Legal Services lawyers are in fact engaged in *private* speech, not *government*

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[6] In *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998), the Court strongly suggested that the government is barred from engaging in "invidious viewpoint discrimination" even when awarding artistic grants, which this Court characterized as more akin to a prize than a public forum. This is so, at least in part, because the private artistic expression supported by the NEA is not generally understood as the government's speech.

speech, when representing clients. Indeed, the dangers inherent in viewpoint discrimination are especially apparent in the context of this case where the government may be an adversary party in litigation it is funding, and thus possesses an inescapable self-interest in restricting the terms of the legal debate.

For that reason, among others, Congress explicitly recognized when it established LSC that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. §2996(6).[7] As this Court well knows, those standards generally stipulate that the decision to waive or assert a claim on behalf of a client must rest solely on the lawyer's "professional judgment," and not be dictated by a government funder or anyone else. *See, e.g.*, 22 N.Y.C.R.R. §1200.26 (DR5-107); 22 N.Y.C.R.R. §1200.32 (DR 7-101). In this regard, Legal Services lawyers are no different than all other lawyers. They act and speak as agents of their clients, not as agents of the government.

To be sure, the government has every right to say that it wants its own money spent on certain kinds of cases. For example, the government need not support bankruptcy cases if it chooses not to, just as it may limit its support of a public defender's office to criminal representation. But within the category of cases it has chosen to fund, the government may not dictate the arguments that a Legal Services lawyer makes on behalf of a client, especially in litigation

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[7] *See also* 42 U.S.C. §2996e(b)(1)(B)(3)(LSC "shall not . . . interfere with any attorney in carrying out his professional responsibilities . . ."); 42 U.S.C. §2996f(a)(1)(LSC must protect "the integrity of the adversary process from any impairment in furnishing legal assistance to eligible clients").

where the government is an adversary. The doctrine of viewpoint neutrality erects a constitutional barrier against such manipulative funding schemes. *See, e.g., Speiser v. Randall*, 357 U.S. 513, 519 (1958)(tax policies may not be designed to "aim at the suppression of dangerous ideas").[8]

B. The First Amendment Prohibition Against The Use of Government Funding To Impose Viewpoint-Based Restrictions Is Not Limited To Circumstances Where The Government Subsidizes A Public Forum

Petitioner Legal Services Corporation seeks to avoid the force of this conclusion by suggesting that, in the government funding context, the First Amendment prohibition against viewpoint discrimination is limited to public forum cases, and that this case does not involve government funding of a public forum or even a limited forum. LSC Brief at 26-28. Petitioner, however, misconceives the controlling constitutional rule. The prohibition against viewpoint discrimination is not limited to circumstances where government subsidizes a forum for communication. It applies, as well, to other sorts of communicative relationships and institutions funded or subsidized by the government. One such example is provided by our public universities.

Indeed, when state-funded universities first developed in this country, scholars feared that politicians would use the power of the purse to dictate the content of curriculum. Thus, Professor Arthur Lovejoy, one of the founders of the American Association of University Professors (AAUP) and one of the principal authors of the AAUP's 1915 Report on Academic Freedom wrote, some years later, that "the dis-

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[8] In our view, the effort to restrict lawyer speech in a viewpoint-based way also raises significant due process issues, although they have not been the focus of this litigation.

tinctive social function of the scholar's trade cannot be fulfilled if those who pay the piper are permitted to call the tune." Lovejoy, "Professional Association or Trade Union?", 24 AAUP Bull. 409, 414 (1938), quoted in Rabban, "Does Academic Freedom Limit Faculty Autonomy?", 66 Tex.L.Rev. 1405, 1413 (1988). Largely in response to this concern, principles of academic freedom were developed to insulate the lectures and writings of faculty members from influence by funding sources, whether such sources were private or governmental. *See* Metzger, "Profession and Constitution: Two Definitions of Academic Freedom in America," 66 Tex.L.Rev. 1265, 1277 (1988).

These principles acquired constitutional recognition in *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957). *Sweezy* arose out of an investigation begun by the Attorney General of New Hampshire into the subject matter of a lecture delivered at a state university by a faculty scholar. In holding the investigation unconstitutional, both the plurality opinion of Chief Justice Warren and the concurring opinion of Justice Frankfurter discussed the importance of academic freedom. Justice Frankfurter, in particular, warned against the "grave harm resulting from governmental intrusion into the life of a university . . . [and in] compelling a [scholar] to discuss the contents of his lecture . . . ." *Id.* at 261.

Subsequent cases have reinforced the notion that academics have a First Amendment right to remain free from governmental intrusion into scholarly discourse even if the government is funding the academic enterprise. For example, in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the Court held that the First Amendment protected faculty members at a state university from dismissal based on their supposedly "seditious utterances," or because they refused to sign a certification stating that they did not belong to the Communist Party. In ruling in favor of the faculty, this Court announced that "[o]ur Nation is deeply committed to

safeguarding academic freedom, which is of transcendent value to all of us . . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* at 603.

This concern for government-imposed orthodoxy within the classroom was subsequently explored in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990). In that case, the Court examined an inquiry by the EEOC into the peer review process employed by a university in making tenure decisions. The university attempted to resist disclosure of its employment processes arguing, in part, that such disclosure would compromise academic freedom. This Court rejected the university's argument but, nonetheless, recognized the application of academic freedom principles where "government was attempting to control or direct the *content* of the speech engaged in by the university or those affiliated with it." *Id.* at 197 (emphasis in original). After reviewing its decisions in *Sweezy* and *Keyishian*, the Court observed: "When in those cases, the Court spoke of 'academic freedom' and the right to determine on 'academic grounds who may teach' the Court was speaking in reaction to content-based regulation." 493 U.S. at 197. The *EEOC* Court also made clear that its reference to content regulation reflected a more specific concern that government would endeavor to "direct . . . university discourse toward or away from particular subjects or points of view." *Id.* at 198.

Thus, the political branches of government may decide to fund a university, or not. They may sponsor a law school and not a medical school. Within the context of a government-sponsored academic program, however, the scholars and academics must remain free to pursue their individual academic expression without intrusion by the politicians. For it is well understood that when scholars engage in aca-

demic discourse, even in a public university, they are conveying their own ideas and not those of the state.

A similar understanding applies to Legal Services lawyers who sue the government on behalf of their clients, even if all or part of their salaries are paid by the government. Indeed, this Court has already held as much. In *Polk County v. Dodson*, 454 U.S. 312 (1981), an individual convicted at a state criminal trial subsequently brought suit under 42 U.S.C. §1983 alleging that a public defender who was a full-time employee of the county had failed to provide adequate representation. In holding that the suit should be dismissed, this Court reasoned that lawyers representing indigent defendants in criminal cases are not agents of the state even though they are paid with public funds. Rather, they owe a duty of "undivided loyalty" to their clients. As the Court also recognized, there is a corresponding "constitutional obligation of the state to respect the professional independence of the public defenders whom it engages." *Id.* at 321-22.

The academic freedom analogy is apt, as well, in terms of the role that universities play within our constitutional scheme as institutions devoted to open discourse and the free exchange of ideas, which can only function in an environment that respects "the autonomy and independence of the speakers within them . . . ." Cole, "Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech." 67 N.Y.U. L.Rev. 675, 711 (1992). As Justice Frankfurter noted in *Sweezy*, "[a] university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest." 354 U.S. at 263.[9] In *Rust*, therefore, this Court pointedly linked public

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[9] Elaborating on this principle, Justice Frankfurter wrote: "[I]t is the business of the university to provide that atmosphere which is most con-

(continued...)

streets and public universities as "traditional sphere[s] of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by" the First Amendment. 500 U.S. at 200.

Under our concept of the adversary system, litigation likewise functions as a "traditional sphere of free expression." To be sure, all lawyers are subject to certain restrictions on their courtroom advocacy. Arguments before this Court are limited to thirty minutes per side. The admissibility of trial court testimony is subject to the rules of evidence. But the ability of litigation to serve as a search for truth is severely compromised when, as here, the government attempts to impose viewpoint-based limits on what one litigant can say that were transparently crafted to insulate the government's position from a potentially fatal, constitutional attack.

Seen in these terms, this case is distinguishable from *Rust*. This Court has said that the health care professionals in *Rust* were speaking on behalf of the government, not on behalf of themselves, when they functioned within the Title X program. *See Rosenberger*, 515 U.S. at 833 (citing *Rust*, 500 U.S. at 194, 196-200). Whether that characterization of Title X is correct or not, *see* n.10, *supra*, a lawyer representing an indigent client in a suit against the government cannot possibly be characterized in similar terms as a government spokesperson.

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[9] (...continued)
ducive to speculation, experimentation and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university -- to determine itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy*, 354 U.S. at 263. (citation omitted).

Moreover, the *Rust* Court described the Title X program as limited to the provision of family planning services and information. "Postconception medical care," including both prenatal care and abortion-related services, were deemed equally "outside the scope of the federally funded program." 500 U.S. at 193-94, 200. Here, by contrast, the government funds legal services lawyers to represent clients seeking to establish their eligibility for welfare benefits. A claim that might establish such eligibility by invalidating a rule under which the client was denied benefits is in no sense "outside the scope" of the program. Such a claim serves the program's goals of ensuring that eligible clients receive the benefits to which they are legally entitled.

In short, this case is simply not governed by *Rust*. Rather, it is governed by the more general set of First Amendment principles that apply when government has decided to fund or subsidize a communicative relationship or institution devoted to discourse and expression, and where it is well understood that those engaged in such expression are not conveying the government's message. Accordingly, in this case, unlike *Rust*, Congress cannot employ the power of the purse to dictate the content of the expression.[10]

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[10] While we firmly believe that this case is distinguishable from *Rust*, *amici* also believe that the ruling in *Rust* can and should be reconsidered if this Court concludes otherwise. In particular, we believe the challenged Title X provisions in *Rust* were plainly viewpoint based, and should have been struck down on that ground alone. In addition, we disagree with the Court's conclusion in *Rust* that the physicians working in a Title X program either view themselves, or are viewed by their patients, as mouthpieces for the government. Doctors treating patients, like lawyers representing plaintiffs or professors delivering lectures, should be shielded from government imposed restrictions on their speech whether they are working in a publicly funded setting or not. At the very least, *Rust* should not be extended beyond its particular facts.

C. The Restrictions At Issue Amount To Viewpoint Discrimination That Burdens The Attorney-Client Relationship And The Right Of Clients To Effective And Independent Advocacy

In an effort to avoid the line of precedent holding viewpoint discrimination violative of the First Amendment, petitioners seek to characterize the restrictions at issue as categorical limitations that curtail the sorts of cases that LSC-funded lawyers can pursue on behalf of clients, but do not restrict what those lawyers can say to their clients or what claims clients can advance through lawyers not associated with the Legal Services Corporation. LSC Brief at 29; U.S. Brief at 35-37. LSC carries this argument further by suggesting that since clients remain free to assert any claims they wish -- even if some claims cannot be advanced by lawyers associated with the Legal Services Corporation -- the restrictions at issue here impose no significant burden upon rights of free expression or association. LSC Brief at 32.

These arguments are misconceived for several reasons. First, the suggestion that the restrictions at issue do not burden First Amendment rights because Legal Services lawyers remain free to talk to their clients about all of their legal options, and Legal Services clients remain free to retain non-LSC lawyers to challenge the constitutionality of welfare enactments, is both unrealistic and analytically flawed.

The suggestion that indigent clients have open access to the marketplace and numerous options to choose from when they seek a lawyer to pursue constitutional claims on their behalf is overstated. As a practical matter, many indigent clients represented by LSC-funded lawyers have no other option at all, a fact that Congress acknowledged when it created LSC. *See* p.3, *infra*. Furthermore, petitioners' argument discounts the fact that the First Amendment right of

access to the courts embraces the right to establish a relationship with counsel who can provide a "guiding hand" in the litigation process, *Polk*, 454 U.S. at 322; that "implicit in the concept of a 'guiding hand' is the assumption that counsel will be free of state control," *id.*; and that the lawyer-client relationship requires that lawyers remain free to pursue claims in the best interests of their clients. *See generally Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1977).

As this Court recently observed, "[w]e have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." *California Democratic Party v. Jones*, __ U.S. __, 68 U.S.L.W. 4604, 4608 (June 26, 2000). Moreover, "it is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening speech and laws banning speech is but a matter of degree." *United States v. Playboy Entertainment Group, Inc.*, __ U.S. __, 68 U.S.L.W. 4409, 4412 (May 22, 2000).

Petitioners' effort to characterize the restriction at issue as categorical rather than as viewpoint based is similarly misplaced. Lawyers in offices receiving LSC funds are permitted under the statute to represent a category of clients broadly described as indigent individuals eligible for welfare benefits. Moreover, such lawyers are permitted, under the statute, to initiate litigation on behalf of these clients in order to secure the benefits to which such clients are entitled. During the course of that approved litigation, LSC-funded lawyers can concede the constitutionality of existing welfare laws (if they so choose), but they cannot challenge the constitutionality of existing welfare laws (even if it would be in their client's best interest to do so). Such a restriction cannot fairly be described as a categorical limita-

tion. Instead, it amounts to viewpoint discrimination in violation of well-settled First Amendment principles.

II. THE RESTRICTIONS AT ISSUE IMPOSE AN UNNECESSARY AND UNJUSTIFIED BURDEN ON PRIVATELY FUNDED SPEECH

Even if, *arguendo*, the restrictions at issue were regarded as categorical rather than viewpoint based, and even if, *arguendo*, the government could therefore limit the claims that LSC lawyers could advance with federal dollars, the restrictions imposed upon the use of private funding would nonetheless violate the unconstitutional conditions doctrine.

In a series of cases this Court has closely scrutinized efforts by the government to condition public funding and public benefits upon the waiver of First Amendment rights of expression. Viewing the cases together and in context, certain basic principles emerge. First, government regulations that restrict or prohibit the use of private funds to support the exercise of constitutionally protected rights of expression are presumptively unconstitutional.[11] Second, if the government seeks to condition a public benefit -- including public funds -- upon the waiver of constitutional rights of expression, such conditions are impermissible unless narrowly tailored in the pursuit of substantial state interests.

Accordingly, in *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), this Court ruled that nonprofit organizations incorporated under §501(c)(3) of the federal tax code could be required to engage in lobbying through an affiliate

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[11] There can be little dispute that the right to petition the government through associational activity, including both litigation and lobbying, is constitutionally protected. *See, e.g., NAACP v. Button*, 371 U.S. 415 (1963); *In re Primus*, 436 U.S. 412 (1978).

organization incorporated under §501(c)(4) that did not receive the benefit of tax-deductible contributions. The Court began its analysis by noting that both tax-exempt status and tax-deductible contributions are forms of government subsidies. 461 U.S. at 544. Proceeding from the premise that Congress is under no obligation to subsidize the exercise of constitutional rights, the Court then concluded that Congress had permissibly chosen "not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare." *Id.*

Creation of a lobbying affiliate was narrowly tailored to serve the government's interest. Indeed, there probably was no other way to serve the government's interest given the nature of the tax subsidy involved. Even so, the Court was careful to point out that the "IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying." *Id.* at 544 n.6. In other words, IRS did not enforce the separation requirements that LSC has imposed in this case.

One year later, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court struck down a statute that went considerably further than *Regan* by banning editorializing by any educational television station that received a federal grant from the Corporation for Public Broadcasting. As it had done in *Regan*, the Court recognized the First Amendment implications of the government's policy and carefully scrutinized its asserted justifications.[12] "[T]he manifest imprecision of the ban," the Court stated, "reveals that its proscription is not sufficiently tailored to the harms it seeks to

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[12] It is noteworthy that the Court applied heightened scrutiny even when dealing with broadcast, which traditionally has been subject to greater regulation than other First Amendment media. 468 U.S. at 380-81.

prevent to justify its substantial interference with broadcasters' speech." *Id.* at 392.

As understood by this Court, the Title X program at issue in *Rust* was fundamentally different from the subsidy programs at issue in either *Regan* or *League of Women Voters*. As the Court subsequently explained in *Rosenberger*, 515 U.S. at 833, the government in *Rust* "did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program." In the government's view, therefore, the segregation requirement in *Rust* was designed to avoid having the private message of a health care professional confused with the message that the government was seeking to impart. Thus, the requirement of separate facilities and separate personnel upheld in *Rust* ultimately rests on the principle, more fully articulated in *Rosenberger*, that "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Id.*

The "separation requirements" at issue in this case were modeled upon those upheld in *Rust*. But regulation by imitation is hardly a basis for ensuring the narrow tailoring that the Constitution requires where, as here, First Amendment rights are at stake. This case is not *Rust*. Legal Services lawyers do not represent the government; in the context of this case, they represent indigent clients in welfare litigation against the government. Because these lawyers are not delivering the government's message, there is no risk that their speech will create confusion about the government's position on the validity of existing welfare laws. To the contrary, the government's message will presumably be delivered, clearly and unambiguously, by its own legal advocate.

Nor are the "separation requirements" justified by a risk of inappropriate commingling of funds. Separate accounting procedures are fully adequate to ensure that LSC funds are spent only for their intended purpose. Many LSC grantees have long received supplemental funding from non-LSC sources, and LSC has long required strict accounting procedures to segregate the funds.[13] Yet, petitioners have never made any claim during the course of this litigation that current accounting procedures are inadequate, or that serious problems have developed in the past with the commingling of funds. *See League of Women Voters*, 468 U.S. at 390-91 (speculative concerns are insufficient to justify restrictions on privately funded speech).

The First Amendment does not permit the government to adopt a broad prophylactic rule when its legitimate interests can be satisfied through more narrowly tailored means. *See, e.g., NAACP v. Button*, 371 U.S. at 438.

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[13] This accounting requirement is continued in the new regulations. *See* 42 C.F.R. §1610.9; *see also* 45 C.F.R. §1630.3.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals should be affirmed.

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